Supreme Court, U. S.
FILED
FEB 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA AND THE STATES OF ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the
Commonwealth of Massachusetts

J. MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

ROBERT K. CORBIN
Attorney General of Arizona
200 State Capitol Building
Phoenix, Arizona 85007
Attorney for the
State of Arizona

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the
State of Connecticut

(Counsel continued inside front cover)

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
INTERESTS OF THE AMICI CURIAE	1
QUESTIONS PRESENTED	3
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. The Definition Of "Otherwise Qualified Handicapped Individual" By The Court Of Appeals Contravenes Section 504 Of The Rehabilitation Act Of 1973 And The Implementing HEW Regulations	6
II. Contrary To The Holding Of The Court Of Appeals, Section 504 Of The Act Does Not Impose Affirmative Action Requirements On Beneficiaries Of Federal Aid	13
III. A Private Right Of Action Should Not Be Implied Under Section 504	22
IV. Even If A Private Action is Available, The Doctrines Of Exhaustion Of Administrative Remedies And Primary Jurisdiction Should Be Found Applicable	48
CONCLUSION	56

TABLE OF CITATIONS

Cases

Ashwander v. TVA, 297 U.S. 288 (1936)	31
Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977)	17, 43
Barnes v. Converse College, No. 77-1116 (D.S.C., order filed Mar. 28, 1978)	51
Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975)	43

PAGE

Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977) 43

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 48

Board of Curators of the University of Missouri v. Horowitz, 434 U.S. 78 (1978) 40

Bradley v. School Board of Richmond, 416 U.S. 696 (1974) 23, 54

Camenisch v. University of Texas, No. A-78-CA-961 (W.D. Tex. May 17, 1978) 43, 51

Campbell v. Kruse, 434 U.S. 808 (1977) 31

Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1977) 33, 47, 52, 53

Cherry v. Mathews, 419 F. Supp. 992 (D.D.C. 1976) 35, 54

Coleman v. Darden, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977) 47

Cort v. Ash, 422 U.S. 66 (1975) .....*passim*

Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977) 51, 53

Davis v. Southeastern Community College, 424 F. Supp. 1341 (E.D.N.C. 1976) 7, 10, 11

Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978) .....*passim*

Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971) (mem.) 18

Doe v. New York University, 442 F. Supp. 522 (S.D.N.Y. 1978) 50

Drennon v. Philadelphia General Hospital, 428 F. Supp. 809 (E.D. Pa. 1977) 47, 52, 54

DuPree v. City of Chattanooga, 362 F. Supp. 1136 (E.D. Tenn. 1973) 52

Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977) 44

PAGE

Epperson v. Arkansas, 393 U.S. 94 (1968) 40

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 17, 18

Greene v. Howard University, 271 F. Supp. 609 (D.D.C. 1967) 20

Green Street Association v. Daley, 373 F.2d 1 (7th Cir. 1967) 52

Gurmankin v. Constanzo, 411 F. Supp 912 (E.D. Pa. 1976) 43

Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976) 42, 43

Halderman v. Pennhurst State School & Hospital, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977) 43

Healy v. James, 408 U.S. 169 (1972) 41

Herbold v. Trustees of the California State University and Colleges, C-78-1358-RHS (N.D. Cal. July 17, 1978) 51

Johnson v. County of Chester, 413 F. Supp. 1299 (E.D. Pa. 1976) 52

Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) 42

Keyishian v. Board of Regents of the University of New York, 385 U.S. 589 (1966) 41

Lau v. Nichols, 414 U.S. 563 (1974) 31, 45, 46

Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) .. 42

Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) .....*passim*

Mayor and City Council of Baltimore v. Mathews, 562 F.2d 914 (4th Cir. 1977) 48

McKart v. United States, 395 U.S. 185 (1969) ... 48

Meyer v. Nebraska, 262 U.S. 390 (1923) 41

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 27

Davis v. Bucher
451 F. Supp. 791 (E.D.Pa. 1978)..... 8, 17
Dermott Special School Dist. v. Gardner, 278 F. Supp. 687 (E.D. Ark. 1968).....28
Doe v. Colautti
454 F. Supp. 621 (W.D. Pa. 1978).....17
Doe v. Grile
No. F 77-108 (N.D. Ind. Aug. 10,1978).....17
Doe v. Marshall
459 F. Supp. 1190 (S.D. Tex. 1978).....17
Doe v. New York University
422 F. Supp 809 (S.D. N.Y. 1978)..... 8, 18
25, 28
Drennan v. Philadelphia General Hospital, 428 F. Supp. 809 (E.D. Pa 1977)..... 7, 18
Duran v. City of Tampa
430 F. Supp. 75 (M.D. Fla.1978).7, 17
Flanagan v. President & Directors of Georgetown College.
417 F. Supp. 377 (D.D.C. 1976). 9
Guernsey v. Rich Plan of the Mid-west, 408 F. Supp. 582 (N.D. Ind. 1976)..... 12
Gurmankin v. Costanzo
556 F. 2d 184 (3rd Cir. 1977). 7
Hairston v. Drosick
423 F. Supp. 1190 (S.D. Tex. 1978)..... 17
Halderman v. Pennhurst
466 F. Supp. 1295 (E.D. Pa. 1977)..... 8, 17

Hairston v. Drosick
423 F. Supp. 180 (S.D.W.Va. 1976)..... 6, 17
Howard S. v. Friendswood Ind. School District, 454 F. Supp. 634 (S.D. Tex. 1978).....28
Jayne v. University of Nevada
No. R-76-183 BRT (D.Nev. June 10,1977)..... 7
Kampmeier v. Nyquist
553 F.2d 296 (2nd Cir. 1977).. 7
Lau v. Nichols
414 U.S. 563 (1974)..... 8, 9
10, 18
Laufman v. Oakley Building and Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976).....10
Leary v. Crapsey
566 F. 2d 863 (2nd Cir. 1977). 7
Like v. Carter
448 F. 2d 798 (8th Cir.1971)..12
Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977)..... 7, 9
10, 11
12, 13
19, 28
Lora v. Board of Education
456 F. Supp. 1211 (E.D.N.Y. 1978).....17
Marable v. Alabama Mental Health Board, 297 F. Supp. 291 (M.D. Ala. 1969).....11
Michigan Paralyzed Veterans of America v. Coleman, 451 F. Supp. (E.D. Mich. 1977)..... 8, 17
Mielke v. Hannon
75 Civ. 473 (N.D. Ill.).....24

National Ass'n. for Community Development v. Hodgson 356 F. Supp. 1399 (D.D.C. 1973).12
Natonabah v. Bd. of Ed. 355 F. Supp. 716 (D.N.M. 1973)..10
NYSARC v. Carey 393 F. Supp. 715 (E.D.N.Y. 1975).....12
NYSARC v. Carey No. 72-356,357 (E.D.N.Y. orders issued Sept. 14,1978 and Feb.28, 1979).....17
Pedro v. Bishop No. 78-083P(N.D. Miss. Oct. 28, 1977).....17
Regents v. Bakke U.S. 57 L. Ed.2d 750 (1978).....10, 18 20
Rios v. Read 75 Cir. 296 (E.D.N.Y. October 13,1978).....23
Rogers v. Frito-Lay 433 F. Supp. 200 (N.D. Tex. 1977)..... 8
Serna v. Portales Municipal Schools, 499 F.2d 1147 (9th Cir. 1974).....11
Shera v. Waier 457 F. Supp. 1034 (W.D. Mo.1978)17
Simon v. St. Louis County C.A. 77-1140 C(4) (E.D. Mo. Jan. 31,1978)..... 8, 16
Sites v. McKenzie 423 F. Supp. 1190 (N.D.W. Va. 1976)..... 7, 17
Snowden v. Birmingham-Jefferson County Transit Authority 407 F. Supp. 394 (N.D. Ala.1975) aff'd per curiam, 551 F. 2d 862 (5th Cir. 1977)..... 6, 17

Stubbs v. Kline 463 F. Supp. 1034 (W.D. Mo. 1978).....17
Sullivan v. Chase Inv. Servs. of Boston, Inc., 434 F. Supp. 171 (N.D. Cal. 1977).....12
Trageser v. Libbie Rehabilitation Center, Inc., cert. granted, 78-1454..... 2
United Handicapped Federation v. Andre, 588 F.2d 413 (8th Cir. 1977)..... 7
Vanco v. Finlay 440 F. Supp. 656 (N.D. Ohio 1977) 7, 17
Walker v. Southern Ry. Co. 385 U.S. 294(1966).....28
Whitaker v. Board of Higher Education 461 F. Supp. 99 (E.D. N.Y. 1978)12, 16 23, 24, 28

Statutes and Regulations

29 U.S.C. §706(6)..... 3
29 U.S.C. §791, et seq.....passim
42 U.S.C. §1983..... 3
42 U.S.C. §1988.....14, 15
42 U.S.C. §2000d et seq..... 8, 18
45 C.F.R. 80·6-80·10.....18, 20 22, 23
45 C.F.R. 84.6.....20

Legislative History

124 Cong. Rec. 15590,15593
(Sept. 20,1978).....14, 15
H. Rep. No. 95-1149,
95th Cong., 2d Sess.(1978)....12
S. Rep. No. 95-890,95th Cong.,
2d Sess. (1978).....13
S. Rep. No 93-1297,
93rd Cong., 2d Sess. (1974)...11

Other Authorities

Jaffe, Judicial Controls of
Administrative Action (1965)..19
Johnston, "Private Rights of
Action under Title IX,"
13 Harv. C.R.C.L.L. Rev. 425,
444-445 (1978).....12
Schwartz, Administrative
Law (1976).....19

In The
SUPREME COURT OF THE UNITED STATES

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

vs.

FRANCES B. DAVIS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE AMERICAL CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHER CALIFORNIA, AMICI CURIAE

Interest of Amici Curiae */

The American Civil Liberties Union is a nationwide, non-partisan organization of two hundred thousand members, dedicated to defending the principles embodied in the Bill of Rights to the Constitution. The New York Civil Liberties Union and the American Civil Liberties Union of Southern California are state affiliates of the ACLU, operating in New York State and Southern California, respectively.

The ACLU and its affiliates have a deep interest in protecting the Constitutional and statutory rights of handicapped individuals, including rights secured by the Rehabilitation Act of 1973, 29 U.S.C. 794. In the belief that judicial enforcement can best secure the rights of handicapped individuals, the ACLU has represented developmentally disabled plaintiffs in the Willowbrook case, NYSARC v. Carey, 393 F.Supp. 715 (E.D.N.Y. 1975), and petitioner in Trageser v. Libbie Rehabilitation Center, Inc., cert. granted, 78-1454, among others.

---

*/ Consents to the filing of a brief Amicus Curiae have been obtained from all parties and have been lodged with the Clerk's office.

This case raises important questions concerning the ability of handicapped persons to make the rights secured by the Constitution and the Rehabilitation Act a reality. For good reason, courts rather than administrative agencies have been the primary guarantors of such important personal rights. Amici submit this brief in support of the traditional role of the courts in vindicating civil rights.

STATEMENT OF THE CASE

Respondent Frances Davis, an individual with a hearing disability, sought and was denied admission to the Associate Degree Nursing Program offered by petitioner Southeastern Community College. After unsuccessfully seeking reconsideration of that denial by the college President, an informal review procedure provided by the college, Ms. Davis filed a civil action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and 42 U.S.C. §1983, alleging discrimination in admission on the basis of her hearing disability.

The trial court upheld respondent's right to maintain the action without exhaustion of further administrative remedies, 424 F. Supp. 1341 (E.D.N.C. 1976). However, the court held that although respondent is a "handicapped person" within the meaning of 29 U.S.C. §706(6), the college's actions did not constitute discrimination. On appeal, a panel of the Fourth Circuit unanimously affirmed the district court's holding as to the private right of action and exhaustion issues, and remanded on the merits of the claim itself for consideration by the district court of recently promulgated regula-

tions implementing Section 504. A petition for rehearing and suggestion for rehearing en banc were subsequently denied without opinion. 574 F.2d 1158, 1163.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici have special experience and expertise in two of the questions for which the Court granted certiorari in this case - whether §504 of the Rehabilitation Act of 1973 confers a private right of action and whether administrative exhaustion is required, at least under the circumstances presented here. Amici's brief is therefore limited to a discussion of these two important points.

Section 504 confers a private right of action on aggrieved handicapped individuals to secure rights guaranteed by the Act. The existence of a private right of action is fully consistent with the standards enunciated by this Court in Cort v. Ash, 422 U.S. 66 (1975), and has been recognized by virtually all federal courts to consider the issue. (Point I)

The Court of Appeals was correct in ruling that administrative exhaustion was not required under the circumstances of this case. The weight of decisional law supports that conclusion (IIA). The administrative process is directed toward the termination of federal funds for systematic non-compliance, and is not designed or implemented to redress specific deprivations of individual rights (IIBi). Moreover, because H.E.W. is currently faced with severe delays in investigating and processing individual complaints, exhaustion

of the administrative process is presently futile, as even H.E.W. concedes (IIBii).

ARGUMENT

I. SECTION 504 OF THE REHABILITATION ACT OF 1973 MAY BE ENFORCED BY A PRIVATE RIGHT OF ACTION.

By enacting the Rehabilitation Act of 1973, Congress intended to make "participation in society more feasible for handicapped individuals." 1973 U.S. Code Cong. & Adm. News 2092. Virtually every federal court to consider the question presented here has concluded that a private right of action on behalf of handicapped individuals against those who have discriminated on the basis of handicap is both necessary and proper "and intended" under §504 of the Rehabilitation Act. That conclusion, endorsed by the Fourth Circuit in this case, 574 F.2d at 1159, is entirely consistent with the reasoning of this Court's decision in Cort v. Ash, 422 U.S. 66 (1975), where the standards for implying rights of action were set forth.

A. The Lower Federal Courts Are In Virtually Unanimous Agreement That §504 May Be Enforced By A Private Right Of Action.

The federal courts have from the outset construed §504 of the Rehabilitation Act of 1973, 29 USC §794, to create a private right of action. In the earliest cases, most courts simply assumed the existence of such a right. See e.g. Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976); Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975). Indeed, the district court did the same here. With the passage of time this unstated assumption has been more frequently made explicit after careful analysis of legislative history and relevant decisional law.

Sites v. McKenzie, 423 F. Supp. 1970 (N.D.W.Va.1976), was the first case expressly to recognize a private right of action under §504. In Sites, plaintiff asserted that defendants' denial of vocational rehabilitation opportunities to mentally ill prisoners violated the anti-discrimination strictures of §504. The court granted plaintiff's motion for summary judgement stating that §504 "... provides a cause of action for any discrimination on the basis of such handicap..." 423 F.Supp. at 1197.

Sites was followed by Lloyd v. Illinois Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977), which based its conclusion that a private right of action could be implied under §504 upon a detailed analysis of this Court's decisions on implied rights of action. Lloyd's holding has been adopted by every circuit court which has since considered the issue. See Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir.1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Leary v. Crapsey, 566 F.2d 863 (2nd Cir.1977); Davis v. Southeastern Community College, 574 F.2d 1178 (4th Cir.1978); see also Gurmankin v. Costanzo, 556 F.2d 184 (3rd Cir.1977), Coleman v. Darden, 47 U.S.L.W. 2583 (10th Cir. Feb. 23, 1979).1/

1/ Most District Courts passing on the question have recognized a private right of action under Section 504. See Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis.1977); Drennon v. Philadelphia General Hospital, 428 F. Supp. 809 (E.D. Pa. 1977); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); Vanko v. Finley, 440 F. Supp. 656 (N.D. Ohio 1977); Jayne v. University of Nevada, Reno, No. R-76-183

In determining that a private right of action was appropriate under Section 504, the Lloyd court first noted the near identity of language in §504 and Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d.2/ Recognizing that the practice under Section 601 would bear heavily on plaintiffs' right to bring a private action pursuant to Section 504, the court then reviewed the practice under Title VI and discussed Lau v. Nichols, 414 U.S. 563 (1974), in which this Court recognized a private action under Title VI and permitted private persons to

---

1/(cont'd)
BRT (D. Nev. June 10, 1977); Michigan Paralyzed Veterans of America v. Coleman, 451 F.Supp. 7 (E.D. Mich. 1977); Halderman v. Pennhurst, 466 F.Supp. 1295 (E.D.Pa. 1977); Simon v. St. Louis County, Missouri, No. 77-1140 C.(4) (E.D. Mo. Jan. 31, 1978); Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978); Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); cf. Rogers v. Frito-Lay, 433 F. Supp. 200 (N.D. Tex. 1977) (private right of action upheld, but §504 held not to apply to mere government contractors). Contra, Doe v. New York University, 442 F. Supp. 522 (S.D.N.Y. 1978).

2/ Section 504 is patterned after, and is almost identical to the anti-discrimination language of Section 601, 42 U.S.C. §2000d, which provides:

> "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in,

challenge the failure of the San Francisco School District to offer classes in the Chinese language to Chinese speaking children.3/ The court found Lau "dispositive" in support of the private right of action. The court in Lloyd further noted that the regulations implementing Section 504 established affirmative individual rights which further supported a private cause of action under this Court's Lau analysis. Lloyd, supra at 1280, 1281.4/

2/ (cont'd)
> be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Moreover, §505 of the Act, which was added in the 1978 amendments, Pub.L.95-1149, now expressly provides:

> "The remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal Assistance or Federal provider of such assistance under Section 504 of this Act."

The regulations promulgated by HEW to implement §504 are similarly explicit. Under 45 C.F.R. §84.61, "The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 [45 C.F.R. §80.6 and 45 C.F.R. Part 81] apply to this part."

3/ The lower federal courts have agreed that a private fight of action should be implied under §601. See, e.g., Bossier Parish School Board v. Leman, 370 F.2d 847, 852 (5th Cir.), cert. denied, 388 U.S. 911 (1967); Flanagan v. President and Directors of Georgetown College,

4/ SEE next page.

Additionally, the Lloyd Court found support for a private right of action under Section 504 by reference to Cort v. Ash, supra, 422 U.S. 66 (1975). In Cort, this Court listed four factors for determining whether a private remedy is implicit in a statute silent on the subject:

> First, is the plaintiff "one of the class for whose special benefit that statute was enacted" - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the

---

3/ (cont'd) 417 F. Supp. 377 (D.D.C. 1976); Laufman v. Oakley Building & Loan Co.,408 F. Supp. 489, 498-499 (S.D. Ohio 1976); Natonabah v. Board of Education, 355 F. Supp. 716, 724 (D.N.M. 1973). In Regents of the University of California v. Bakke, 98 S.Ct. 2733(1978), decided since Lloyd, four Justices of this Court found an implied right of action under Title VI; four others assumed it for purposes of that case.

4/ The Lau Court had relied heavily on the existence of administrative regulations to support a private cause of action. 414 U.S. at 567-568.

> concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78. (citations omitted)

Applying this test, the Lloyd court concluded that the plaintiffs met the standards set forth in Cort for a private action, because, as persons whose mobility was impaired, the plaintiffs were among the class "for whose special benefit" Section 504 had been enacted. The Lloyd court further found a strong indication of Congressional intent to create a private remedy citing a Senate Labor and Public Welfare Committee report which noted that Section 504 "...was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964..." S. Rep.No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). The Senate Labor and Public Welfare Committee noted (id. at 40) that "section 504, which closely follows the models of the above-cited anti-discrimination provisions, would "...permit a judicial remedy through a private action."5/ The Court also concluded that implying a private remedy for plaintiffs was consistent with a primary purpose under-

---

5/ As already noted, a number of federal courts had ruled or implied that §601 of the Civil Rights Act of 1964 created a private right of action by the date of the just-quoted Senate Report. See Serna v. Portales Municipal Schools, 499 F.2d 1147 (9th Cir. 1974); Cypress v. Newport News General and Nonsectarian Hospital Ass'n., 375 F.2d 648 (4th Cir. 1967); Marable v. Alabama Mental Health Board, 297 F. Supp.291 (M.D. Ala.1969). These decisions were certainly known to Congress when it analysed §504 to Title VI.

lying the Rehabilitation Act. in this case statutory and regulatory standards regarding barrier-free construction of public facilities.6/ Finally, the court recognized that affording plaintiffs a private remedy to vindicate the transportation needs of the disabled would not encroach upon an area traditionally relegated to state law. The Court concluded, "Because all four Cort tests are satisfied, we are reinforced in our holding that Section 504 implicitly provides a private remedy." Lloyd, supra at 1287.

6/ In assessing this third element of the Cort test, one factor which courts have considered in the past is whether private suites "aided an otherwise overworked or inefficient administrative Agency." Johnston, "Private Rights of Action under Title IX, 13 Harv. C.R.C.L.L. Rev. 425, 444-445 (1978). See J.I. Case Co. v. Borak,377 U.S. 426 (1964); Like v. Carter, 448 F.2d 798 (8th Cir. 1971); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966); Sullivan v. Chase Inv. Servs., of Boston, Inc., 434 F. Supp. 171 (N.D.Cal.1977); Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D.Ind. 1976); National Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973); Common Cause v. Democratic National Comm., 333 F. Supp. 803 (D.D.C.1971). That is clearly the situation here, as described in Point II, infra. Significantly, "The Office for Civil Rights, as a matter of policy, believes that complainants should have a private right of action under Section 504 in federal courts..." Affidavit of Michael A. Middleton, Director, Division of Policy, Planning and Research of OCR, submitted in Whitaker v. Bd. of Higher Ed., 461 F.Supp. 99 (E.D.N.Y. 1978) (hereinafter "Middleton affidavit").

B. The 1978 Amendments To The Rehabilitation Act Reaffirm The Congressional Intention To Allow Private Enforcement of §504.

Developments since Lloyd affirm the correctness of that decision. Most importantly, in 1978 Congress amended the Rehabilitation Act to provide, inter alia, that courts may award attorneys' fees in "any action or proceeding to enforce or charge a violation of a provision of this title." P.L.95-602, §120(a), 92 Stat. 2983. As explained in the accompanying House Report, the purpose of this addition was to provide "attorneys' fees to successful parties in judicial actions to enforce the provisions of Title V." H.Rep. No. 95-1149, 1978 U.S. Code Cong. & Adm. News 7490, 7491 (emphasis added). The only possible interpretation of this unambiguous language is that the 95th Congress believed that a private right of action was available to enforce the substantive provisions of §504, and that it intended to assist such private enforcement.

In the discussion of the 1978 Amendments to the Rehabilitation Act, Senator Cranston, Chairman of the Subcommittee on Child and Human Development of the Committee on Human Resources, emphasized that the provision for allowance of attorneys' fees by a court "would be an important step in assisting all handicapped individuals in their struggle by permitting equal access to the courts to enforce the provisions of Title V of the Rehabilitation Act of 1973. 124 Cong. Rec. 15590 (Sept. 20, 1978). See also, S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). Senator Cranston emphasized that "the rights extended to handicapped individuals under Title V of the Rehabilitation Act of 1973. . . are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Private enforcement of

these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and that enforcement is uniform." 124 Cong. Rec. 15590 (Sept. 20, 1978).

Senator Bayh noted that the proposed 1978 Amendments were consistent with the initial intent of Congress when Title VI was first enacted in 1964 "to create a private right of action for aggrieved individuals. The Circuit Courts of the United States have clearly acknowledged this congressional intent. (Cases cited from the Fourth, Fifth and Eighth Citcuits omitted)" Id., at 15593.

Further colloquy between Senators Cranston and Bayh emphasized that one of the principal purposes of the passage of the Civil Rights Attorneys Fees Awards Act of 1976, Pub.L. 94-559 was "to encourage appropriate private litigants to bring actions under titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, id. at 15593, and similarly, that "an important reason" for what is now §505, "is to encourage appropriate private litigants to bring actions under Title V of the Rehabilitation Act." Id. Senator Cranston quoted again from the Congressional discussion of the 1974 Amendments to the Rehabilitation Act to stress that Section 504 would "permit a judicial remedy through a private action."

Finally, Senator Bayh concluded his discussion of the 1978 Amendments with the following observation:

> "I thank the distinguished Senator from California for taking time to make clear the continuing intention of Congress that private actions be allowed under titles VI and VII of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972 and title V of the Rehabilitation Act of 1973." Id. (emphasis added). 7/

In sum, a private right of action under Section 504 of the Rehabilitation Act has been endorsed by every Circuit Court of Appeals which has considered the issue. Moreover, these conclusions are consistent with the Supreme Court's standards regarding the appropriateness of private actions set forth in the Cort v. Ash decision, supra.

7/ This language becomes even more compelling when placed against the context of a body of developing case law which had already implied a private right of action under §504. Had Congress originally intended otherwise, it surely could have taken the opportunity presented by the comprehensive Rehabilitation Act Amendment of 1978 to halt that trend. Instead, as Senator Bayh's comments indicate, it confirmed that trend.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED UNDER §504 BECAUSE THE REGULATIONS DO NOT PROVIDE A MEANINGFUL ENFORCEMENT MECHANISM FOR THE VINDICATION OF PERSONAL RIGHTS.

A. Exhaustion of Administrative Remedies is Not Required Under §504 of the Rehabilitation Act.

Neither the language nor the legislative history of §504 specifically requires individual complainants to exhaust their administrative remedies prior to initiating litigation.

A considerable body of case law supports the view that exhaustion is not necessary in the §504 context. In Campbell v. Kruse, 434 U.S. 808 (1977), this Court vacated and remanded a lower court opinion which had been based on constitutional grounds "with directions to decide the claim based on the federal statute, §504 of the Federal Rehabilitation Act of 1973." Id. (emphasis added).

Plaintiff in that case had not exhausted administrative remedies, and this Court's ruling implicitly precluded any attempt to subject plaintiffs' claim to a requirement of prior administrative review.

Since then, other courts have been more explicit in reaching the same result. Most recently, Chief Judge Mishler ruled in Whitaker v. Board of Higher Education, 461 F.Supp. 99 (E.D.N.Y. 1978), that exhaustion is not required in §504 cases. Similarly, in Simon v. St. Louis County, C.A. 77-1140 C(4) (E.D. Mo. Jan. 31, 1978), the court refused to dismiss a §504 claim for failure

to exhaust administrative remedies. And in Michigan Paralyzed Veterans of America v. Coleman, 451 F.Supp. 7 (E.D. Mich. 1977), the doctrines of primary jurisdiction and administrative exhaustion were deemed inapplicable to §504 suits. Accord, Doe v. Grile, No. F 77-108 (N.D. Ind. Aug. 10, 1978).

In addition, numerous courts have directly addressed §504 claims, implicitly rejecting an administrative exhaustion requirement .7/

7/ Duran v. City of Tampa, 430 F.Supp. 75 (M.D. Fla. 1978) and 451 F.Supp. 954 M.D.Fla. 1978); Pedro v. Bishop, No. 78-083P N.D. ex. Feb. 21, 1978); Mattie T. v. Holladay, No. DC 75-31-5 (N.D. Miss. Oct. 28, 1977); Halderman v. Pennhurst, 466 F.Supp. 1295 (E.D. Pa. 1977); Vanco v. Finlay, 440 F.Supp. 656 (N.D. Ohio 1977); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Bartels v. Biernat, 427 F.Supp. 226 (E.D. Wis. 1975); Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976); Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975), aff'd per curiam, 551 F.2d 862 (5th Cir. 1977); Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W. Va. 1976); Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978); NYSARC v. Carey, No. 72-356, 357 (E.D.N.Y., orders issued Sept. 14, 1978 and Feb. 28, 1979). Contra, Doe v. Colautti, 454 F. Supp. 621 (E.D. Pa. 1978); Stubbs v. Kline, 463 F. Supp. 110 (W.D. Pa. 1978); Sherer v. Waier, 457 F. Supp. 1034 (W.D. Mo. 1978); Crawford v. Univ. of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); Drennan v.

This Court has decided two cases under Title VI of the Civil Rights Act of 1964, 8/ the administrative procedures of which are identical to those under §504, 9/ which imply that exhaustion is not required in Title VI cases.

In Lau v. Nichols, 414 U.S. 563 (1974), a unanimous Court held that Chinese-American students who had been denied an appropriate bilingual education by the San Francisco school system had a private right of action under Title VI. In remanding the case to the district court for further proceedings, there was no suggestion in the Court's opinion that it anticipated or intended that plaintiffs first exhaust whatever administrative remedies might have been available. Similarly, and more recently, eight of nine justices in Regents v. Bakke, ___ U.S. ___, 57 L.Ed. 2d 750 (1978), were willing to consider the merits of Bakke's Title VI claim although it is clear from the procedural history of the case, and indeed from Justice Powell's opinion, 57 L.Ed. 2d at 767, that Bakke had not pressed his assertion of reverse discrimination before HEW prior to initiating his action.

(footnote 7 cont'd.) Philadelphia Gen'l. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Doe v. New York University, 422 F. Supp. 809 (S.D.N.Y. 1978).

8/ 42 U.S.C. §2000d et seq.

9/ 45 C.F.R. 80.6-80.10. See §120(a) of the Rehabilitation, Comprehensive Services and Developmental Amendment of 1978 P.L. 95602, to be codified as 29 USC §794a(a)(2) (Title VI remedies and procedures applicable to §504 cases).

B. The Futility of Filing an Administrative Complaint with H.E.W. Renders Exhaustion Unnecessary.

It is a well-established principle of administrative law that exhaustion is not required if the only available administrative remedy is plainly inadequate. See generally Schwartz, Administrative Law 499 (1976); Jaffe, Judicial Controls of Administrative Action, 426-432 (1965). That principle has been recognized in §504 cases as elsewhere. Thus, in Lloyd v. Regional Transportation Authority, 548 F. 2d 1277, 1286 (7th Cir. 1977), the Seventh Circuit noted that the doctrine of exhaustion presupposes the presence of ". . . a meaningful administrative enforcement mechanism" structured ". . . to vindicate an affirmative right." In the absence of a meaningful administrative remedy, 10/ the Lloyd court held that "neither the exhaustion nor primary jurisdiction doctrine applies." Id. at 1287.

For two reasons, one structural and one institutional, a meaningful administrative enforcement mechanism does not exist under §504. Under the circumstances, to insist upon exhaustion is merely to require that plaintiffs engage in a futile gesture.

10/ At the time Lloyd was decided, the §504 regulations were not in effect.

i. HEW'S Enforcement Procedures Under §504 Are Not Designed to Remedy Individual Complaints of Discrimination.

The regulations adopted by HEW pursuant to §504, 45 C.F.R. §84.6, incorporate by reference the administrative procedures applicable to Title VI of the Civil Rights Act of 1964, 45 C.F.R. §80.6 - 80.10 and Part 81. Those procedures in turn focus exclusively on the question of whether or not, in light of the policies and practices of a recipient of federal assistance, HEW should cut off federal funds. It is important to emphasize that this administrative mechanism is not designed to remedy deprivations of the personal rights of individual complainants, but rather to determine whether, in light of systematic noncompliance, recipients should continue to receive federal funds.

In the context of Title VI, the distinction between vindication of personal rights and termination of federal funds is reflected in the statute itself, as Justice Stevens observed in his opinion in Bakke v. Regents, supra, 57 L.Ed. 2d at 852, n. 26.

> The government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds . . . Section 601 is specifically addressed to personal rights, while §602 - the fund cut-off provision - established an

> elaborate mechanism for governmental enforcement by federal agencies. Id. at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme. . . . The difference between their two courses of action is clear and significant. As the Government itself states:
>
> "[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602 . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations [including administrative exhaustion] contained in Section 602." Supplemental Brief, supra, at 30 n. 25.
>
> The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See Rosado v. Wyman, 397 U.S. 397, 420.

Quite clearly, the regulations promulgated by HEW to implement §504 do nothing more than "authorize [a] termination of funds." The regulations define an administrative scheme by which the Secretary of HEW can monitor and enforce the nondiscrimination provisions of a contract between HEW and the recipients of federal financial assistance. The regulations are not designed to redress the personal grievances of handicapped individuals who suffer from discrimination in federally funded programs. If anything, the termination of funds will only leave such individuals in far worse straits.

Under the regulations HEW must initiate an administrative investigation whenever a compliance review or other information, including an individual complaint, indicates a possible violation of the statute or regulations. 45 C.F.R. §80.7. No provision, however, is made for an individual complainant to furnish evidence or otherwise participate in the investigation. 45 C.F.R. §80.7 (c). If HEW concludes that there is no violation, it gives notice to both the recipient and the complainant - but the individual complainant has no right to object to or seek review of HEW'S finding. 45 C.F.R. §80.7 (a)(2). Should HEW determine that the recipient is not in compliance, attempts are then made to obtain voluntary compliance in accord with the statutory mandate. But HEW can totally ignore the individual victim of past discrimination in its efforts to secure voluntary compliance for the future.

If voluntary compliance efforts fail, an administrative hearing is held. 45 C.F.R. §80.8 -80.9. The determination as to whether a hearing will occur

and the definition of the issues to be pursued is solely the province of HEW and the reciepient.See 45 C.F.R. §80.9(a). At the hearing both HEW and the recipient have the right to be represented by counsel, 45 C.F.R. §80.9(c), and to present relevant evidence, 45 C.F.R. §80.9(d). No such rights are granted to individual complainants. HEW is not required to conduct the hearing on behalf of the individual and in no sense is the hearing intended to provide a forum to obtain individual relief.11/In particular, the administrative scheme does not provide the array of equitable remedies which are available to private litigants in federal court. Thus HEW is not empowered to issue a binding award of damages, backpay, or reinstatement to a victim of discrimination under §504. Whitaker v. Bd. of Higher Ed., supra.

Moreover, the withdrawal of federal assistance from a noncomplying program may "defeat the purpose of the private litigant by terminating the allocation of funds and the . . . program." Rios v. Read, 75 Civ. 296 (E.D.N.Y. October 13, 1978). In Rios, a case brought under Title VI, the court observed that plaintiffs' interests were in the continuation of federal funding in order to provide an adequate bilingual educational program in compliance with Title VI. The HEW remedy, however,

---

11/The regulations provide that in the event of noncompliance H.E.W. may effect compliance by cutting off funds or "by any other means authorized by law." The Court in Whitaker found those "other means" to be "unclear," and stated that a cut-off of funds was the principal sanction and that "the regulations simply provide no procedures by which any other sanctions may be imposed or judicially reviewed." Whitaker, supra, at 108, n.10.

threatened the very existence of those services to which the complainants sought access. Furthermore, the administrative remedy available under Section 504 is essentially prospective. A program that has discriminated in the past may continue to receive federal financial assistance if it desists from doing so in the future and takes steps necessary to come into compliance with the statute. Although future compliance may include rectifying the effects of past discrimination, as a practical matter this process may not afford effective or expeditious relief to individual victims of unlawful discrimination. "In short, while the administrative process may effectively provide, by way of the threat of a funding termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a §504 violation." Whitaker v. Bd. of Higher Ed., 461 F. Supp. at 1081 12/

12/ Even H.E.W. has publicly acknowledged the inadequacy of its enforcement scheme. As amicus curiae in at least two cases before federal district courts, the Department has urged that exhaustion of administrative remedies should not be required as a prerequisite to private litigation under §504. See Brief of the United States in Whitaker v. Bd. of Higher Ed., supra, and in Mielke v. Hannon, 75 Civ. 473 (N.D. Ill.).

ii. H.E.W.'s Backlog in Resolving §504 Complaints Has Rendered the Administrative Process Futile.

Even if the §504 regulations had created an enforcement system theoretically capable of vindicating personal rights, in practice the excessive and undue delays in that system have rendered it inadequate.

According to H.E.W.'s own statistics, the Office for Civil Rights is already so backlogged with §504 complaints that, for all practical purposes, there is no longer an available administrative remedy.

Figures released in the fall of 1978 reveal that, as of June 1, 1978, H.E.W. had received 1264 individual §504 complaints of discrimination nationally since the institution of the regulations on June 3, 1977.13/ Of this total H.E.W. had not even begun to investigate 653 complaints or 51.6% of the total filed. Corrective action, i.e., voluntary compliance, had been effected in only 47 complaints (3.7%) and 83 complaints had been withdrawn.

Further breakdown of these statistics discloses even greater backlogs in

---

13/ These statistics were made available to counsel for amici by the Office of Management and Administration of the Office for Civil Rights (OCR) at H.E.W. in August, 1978 and are current through June 1, 1978. Many of them are contained in plaintiff's Motion for Reconsideration and Memoranda and in the transcript of oral argument held August 4, 1978 in Doe v. N.Y.U., 77 Civ. 6258 (S.D.N.Y.).

resolving particular types of complaints. For example, in post-secondary education, the area in which Ms. Davis' claim of discrimination arose, H.E.W. had received 202 complaints as of June 1, 1978. Only ten letters of finding had been issued, and corrective action had been taken in a scant three instances. Fully 134 individual complaints, or 66% of the total filed, remained uninvestigated. Substantial backlogs in individual complaints of discrimination in post-secondary education existed in Region 3 (15 of 20 outstanding complaints uninvestigated); Region 4 (14 of 20 outstanding complaints uninvestigated); Region 5 (13 of 17 outstanding complaints uninvestigated); Region 6 (16 of 19 outstanding complaints uninvestigated); and Region 7 (14 of 15 outstanding complaints uninvestigated).

H.E.W.'s inability to resolve previously filed §504 complaints expeditiously has severely impaired the Department's ability to handle new complaints. Thus, OCR's Annual Operating Plan for 1978 projected that H.E.W. would investigate only 26 out of 756 complaints likely to be filed under §504 during fiscal year 1978.14/ Of 453 backlog complaints, H.E.W

14/ There is some evidence that OCR underestimated the number of new complaints that would be filed during fiscal year 1978. Region 2, which had anticipated a total of 73 new complaints in 1978 reported 160 new filings as of May 8, 1978. There is also evidence that H.E.W.'s performance in 1978 was slightly better than anticipated, although accurate statistics are not yet available to amici.

predicted that only 14 would be investigated. 43 Fed. Reg. 7048, 7054 (Feb. 17, 1978).

Moreover, even after the long, drawn-out investigative process, severe delays are encountered in the succeeding administrative stages as well.15/ Virtually two years after the effective date of the regulations, H.E.W. has never terminated funding in a §504 case and no administrative hearing has ever been held on a §504 complaint.16/

The delays resulting from H.E.W.'s inability promptly to investigate new and backlogged complaints as well as from the absence of any time limits for the administrative enforcement process, have led to a situation in which H.E.W.'s administrative process could not and cannot currently provide a "meaningful enforcement mechanism." Lloyd, supra, 548

15/ It should be noted that H.E.W. has established no time limits within which it must attempt to enforce the Act upon completion of the investigation of a complaint. A federal court has already found it necessary to impose strict time limits for the investigation phase of the administrative enforcement process, upon finding that administrative delays rendered the rights at issue nugatory. Adams v. Califano, No. 3095-70 (D.D.C., unpublished order December, 1977).

16/ Information furnished to counsel for amici by the Office of Compliance and Enforcement of the Office for Civil Rights at H.E.W. on March 26, 1979. Moreover, according to the Office of Management and Administration of OCR, as of August, 1978, there had been no cut-off of funds under Title VI since 1972.

F.2d at 1286 n.29 for the vindication of private rights.17/

Where there are delays of this magnitude, the case law is clear that plaintiffs need not exhaust administrative remedies before proceeding to court.18/

17/ As summarized in the Middleton affidavit, supra:

> "The Office for Civil Rights has a large backlog of complaints and there is presently no guarantee that any newly filed complaint can be investigated and resolved in an expeditious manner. It would be inconsistent with the Department's desire and the public's need for the speedy resolution of complaints to prohibit aggrieved parties who wish to file suit from doing so and then subject them to a lengthy period of time before acting upon their claim."

18/ See Camenish v. University of Texas, No. A-78-CA-061 (W.D. Tex., May 17, 1978) (preliminary relief granted to §504 plaintiff based on excessive delays); Doe v. New York University, 77 Civ. 6285 (S.D.N.Y. Sept. 12, 1978)(§504 plaintiff permitted to proceed with discovery due to administrative delays); Whitaker v. Board of Higher Education, supra; Howard S. v. Friendswood Ind. School Dist., 454 F.Supp. 634 (S.D. Texas 1978)(11 month delay renders exhaustion futile in §504 case); Dermott Special School Dist. v. Gardner, 278 F.Supp. 687 (E. D. Ark. 1978) (Title VI) See also Walker v. Southern Ry. Co., 385 U.S. 294 (1966).

CONCLUSION

For the foregoing reasons, the Court should hold that section 504 of the Rehabilitation Act of 1973 confers a private right of action, and that exhaustion of administrative remedies is not required, or is futile under the circumstances of this case.

Respectfully submitted,

GEORGE KANNAR
CHARLES S. SIMS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

ROBERT M. LEVY
STEVEN R. SHAPIRO
New York Civil Liberties Union Foundation
84 Fifth Avenue
New York, New York 10011

Of counsel:
BRUCE J. ENNIS

FRED OKRAND
SAM ROSENWEIN
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

Attorneys for Amici Curiae

March 29, 1979